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Are Criminal Codes Irrelevant?

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After planning the effort for twenty years, the American Law Institute spent ten years debating and drafting a model criminal code.[1] Twenty-eight drafters and forty-two advisors produced thirteen

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1. *See* Charles McClain, *Criminal Law Reform: Historical Development in the United States*, *in* 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 501, 510 (Sanford H. Kadish ed., 1983).

reports that were debated at eight annual meetings.[2] Twenty years later, seven reporters with twenty-five advisors completed six volumes of official commentaries.[3]

This monumental drafting effort served as only the starting point for nearly two-thirds of the states that have recodified their criminal codes since the Model Penal Code was promulgated in 1962. In every instance a commission, legislative committee, or both, devoted additional time and energy redebating and revising the 1962 model provisions. In California, for example, a reform commission began work in 1963 and spent six years producing three published tentative drafts.[4] Controversy surrounding the proposals resulted in dismissal of the commission's staff and legislative reorganization of the commission. Two years later the commission completed a fourth tentative draft and submitted it to the legislature. It was never enacted.[5]

Beginning with a 1965 call for a code reform commission, the federal code reform effort has been even more extensive. With the Model Penal Code as a primary resource, a sizable commission staff produced and circulated a study and a final draft federal code.[6] The proposal prompted forty-one hearings by Senate committees over the next six years, resulting in eighteen volumes of materials consuming 10,000 pages.[7] In 1973, two bills were introduced in the Senate, producing another 3000 pages of hearings, but no legislative action.[8] A

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2. Herbert Wechsler, *Foreword* to 1 MODEL PENAL CODE AND COMMENTARIES at xi-ii (Official Draft and Revised Comments 1985).

3. Kent Greenawalt, *Preface* to 1 MODEL PENAL CODE AND COMMENTARIES at xlii (Official Draft and Revised Comments 1985).

4. *See* Arthur H. Sherry, *Criminal Law Revision in California*, 4 J.L. REFORM 429, 441 (1971).

5. STATE OF CALIFORNIA JOINT LEGISLATIVE COMMITTEE FOR REVISION OF THE PENAL CODE, THE CRIMINAL CODE: PENAL CODE REVISION PROJECT STAFF DRAFT at iii (1971); Wechsler, *supra* note 2, at xi.

6. These efforts began with the establishment of the "Brown Commission" (Act of 1966, Pub. L. No. 89-801, 80 Stat. 1516) followed by that commission's final report on reform of federal criminal laws presented in 1971 which consisted of a draft of a new Title 18 of the United States Code. *See* Ronald L. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 CRIM. L.F. 99, 141-44 (1989).

7. *Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 1-922 (1971); 92d Cong., 2d Sess. 923-4203 (1972); 93d Cong., 1st Sess. 4205-6803 (1973); 93d Cong., 2d Sess. 6805-8178 (1974); 94th Cong., 1st Sess. 1-395 (1975); 95th Cong., 1st Sess. 8575-9895 (1977).

8. Gainer, *supra* note 6, at 155-56; *see also* S. 1, 93d Cong., 1st Sess. (1973); S. 1400, 93d Cong., 1st Sess. (1973).

new bill was proposed and considered in the next Congress, but controversy prevented it from coming to a vote.[9] After further revision and compromise, and eight days of debate on the floor, the Senate passed a criminal code reform bill in 1978.[10] The full House did not take up the measure. In subsequent Congresses, the Senate and the House introduced and moved out of committee similar bills but passed none of these, and today's federal system still has no modern criminal code.[11]

The American criminal law reform experience is not unusual. Since 1968, England's Law Reform Commission has produced twenty-one working papers and reports on various aspects of criminal code reform.[12] Six of these have resulted in legislative action of some kind, but a comprehensive criminal recodification effort did not begin until 1980 when a drafting team was appointed.[13] Its report was published five years later. Reports and recommendations by official and unofficial "scrutiny groups" were the basis for a revised draft published in 1989.[14] Parliament has not yet taken up a comprehensive criminal code bill; piece-by-piece reform based on the proposed code is more likely.[15]

Similar reform energy is seen in other countries. In the planning stages since 1965, and after the usual years of drafting, review, consultation, and redrafting, a draft Canadian Criminal Code now awaits

9. S. 1, 94th Cong., 1st Sess. (1975); *see* Gainer, *supra* note 6, at 157-58.

10. S. 1437, 95th Cong., 2d Sess. (1978); *see also* 1 CONG. INDEX, 95th Cong., 1st Sess. 23,049 (1977-78) (Senate vote 72 for; 15 against); Gainer, *supra* note 6, at 161 (same). A corresponding bill in the House did not get out of committee during this session of Congress. *Id.*

11. *See, e.g.*, S. 1630, 97th Cong., 1st Sess. (1981); S. 1722, 96th Cong., 1st Sess. (1979); S. REP. NO. 553, 96th Cong., 2d Sess. (1980) (Senate judiciary committee favorably reported S. 1722 to the full Senate by a vote of 14 to 1); *see also Revision of the Federal Criminal Code: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979) (subcommittee introduced H.R. 6915 based upon testimony before it); S. REP. NO. 307, 97th Cong., 1st Sess. (1982) (Senate Judiciary Committee favorably reported S. 1630 to the full Senate); H.R. REP. NO. 1396, 96th Cong., 2d Sess. (1980) (subcommittee amassed hearing record of over 5500 pages and drafted and secured judiciary committee approval of a code reform bill, which never went to a vote in the House); Gainer, *supra* note 6, at 161-68.

12. 1 THE LAW COMMISSION, CRIMINAL LAW: A CRIMINAL CODE FOR ENGLAND AND WALES (REPORT AND DRAFT CRIMINAL CODE BILL) 2 (1989).

13. *Id.* at 2-3.

14. *Id.* at 3-4.

15. A.T.H. Smith, *Legislating the Criminal Code: The Law Commission's Proposals*, 1992 CRIM. L. REV. 396, 397.

parliamentary action.[16] Within the last two decades, Germany, Austria, and Poland, to name a few, have enacted new codes. France, Spain, Finland, Canada, New Zealand, Russia, many of the former Soviet republics, and a host of others are currently at one stage or another in the code reform process.[17]

The enormous effort devoted to criminal code reform and its attendant controversy lead to a rather inescapable conclusion: People believe that criminal codes matter.[18] It is worth agonizing over and fighting about the particular formulation of a code's provisions.

I agree with the view that criminal codes and criminal code reform are important, and I have enthusiastically participated in all aspects of the code reform process as a code drafter, a legislative counsel, a code reform commission director, an academic devoted to the study of criminal code formulations, and a board member to an international criminal law reform society. Nonetheless, I am troubled by accumulating social science data suggesting what many cops and robbers on the street have long thought: Criminal codes are irrelevant. At the very least, the data suggest that the code reform enterprise merits close examination to determine how and if criminal code provisions have an effect. Is it possible that we devote enormous reform efforts to and argue fervently about issues that do not matter?

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16. REFORM COMMISSION OF CANADA, RECODIFYING CRIMINAL LAW, REPORT NO. 31, at 1-3 (1987); Allen M. Linden & Patrick Fitzgerald, *Recodifying Criminal Law*, 66 THE CANADIAN B. REV. 529, 531-35 (1987).

17. Germany and Austria completed revision of their respective criminal codes in 1975. Poland enacted a new criminal code in 1969 and began revising that code in 1980. Reform of France's criminal code has been underway since 1978, when an official preliminary draft of a reform code was completed. Spain began reform of its criminal code in 1975 and completed a draft code in 1980 which is still under consideration. *See* Hans-Heinrich Jescheck, *Criminal Law Reform: Continental Europe*, *in* 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 484, 485-89 (Sanford H. Kadish ed., 1983). In 1990, Finland's Parliament approved the first stage of a total reform of the country's criminal code. *See* Raimo Lahti, *Recodifying the Finnish Criminal Code of 1889—A Scandinavian Way to Make the Criminal Law More Efficient, Just and Humane*, *in* TOWARDS A TOTAL REFORM OF FINNISH CRIMINAL LAW 55, 60-61 (Raimo Lahti & Kimmo Nuotio eds., 1990). In Russia, the Supreme Soviet Subcommittee on Judicial Reform prepared a detailed report in 1991 proposing wide-ranging reforms in criminal law and criminal procedure, including a complete revision of the country's codes of criminal law. Russian President Boris Yeltsin supports the report and the reform process is presently taking place. *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, HUMAN RIGHTS AND LEGAL REFORM IN THE RUSSIAN FEDERATION 29-34 (1993).

18. As is documented in later sections of this Article, many drafters and scholars are explicit in their belief that code formulations make a difference to the real world. *See infra* text accompanying notes 32-34 (concerning limitations on the use of defensive force), 104 (concerning grading judgments and doctrines of grading, such as extreme emotional disturbance), and 120-21 (concerning competing formulations of the insanity defense).

Consider the three most obvious functions that a criminal code is designed to serve: (1) to announce to the public the conduct that the criminal law prohibits or requires, (2) to set the rules that determine whether to impose criminal liability for a violation of the announced rules, and (3) if liability is imposed, to set the grade of the violation to determine the general range of punishment.[19] What information do we have about the actual effect of the criminal code in each of these respects?

I. CODE AS COMMUNICATOR OF THE LAW'S COMMANDS

A central function of criminal law is to publicly announce what the criminal law commands, both what it prohibits and what it requires. The function is central for two reasons. First, people must know the rules if the deterrent threat of sanction is to have an effect: The law cannot deter people from engaging in conduct that they do not know it prohibits, or compel people to engage in conduct that they do not know it requires. Second, notions of fairness require that a person have a fair opportunity to know the law's commands before being punished for failing to obey them. There can be no blame for a violation if there is not a fair possibility of compliance.[20]

A. A Question of Communication

Does our system effectively communicate to the public what the criminal law commands? Accumulating empirical evidence suggests that public knowledge of the law is embarrassingly low.[21] In multiple

19. Some readers may recognize these three effects as the three functions of criminal law that I have described at length elsewhere. *See* Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. Chi. L. Rev. 729 (1990) [hereinafter Robinson, *Rules of Conduct*]; Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 Nw. U. L. Rev. 857 (1994) [hereinafter Robinson, *A Functional Analysis*].

20. *See, e.g.*, Model Penal Code § 2.04(3)(a) (1985) (giving a defense where a law has not been made reasonably available).

21. *See* LaVell E. Saunders, *Ignorance of the Law Among Teenagers: Is it a Barrier to the Exertion of Their Rights as Citizens?*, 16 Adolescence 711, 713 (1981); *see also* Note, *Legal Knowledge of Michigan Citizens*, 71 Mich. L. Rev. 1463, 1468 (1973) (finding that laypeople's knowledge of the law is significantly lower than those trained in the law). It appears, however, that the public's knowledge of criminal law is commonly better than its knowledge of civil law. *See* Austin Sarat, *Support for the Legal System: An Analysis of Knowledge, Attitudes and Behavior*, 3 Am. Pol. Q. 3, 12 (1975).

A hint of this is found in the recent string of public disclosures that several prominent government officials and judges were unaware of their legal obligations to inquire into whether persons providing household help are legal residents of this country and whether employers are

choice questionnaires about general principles of criminal law, people commonly score no better than chance guessing.[22] One researcher compared adult knowledge of law to that of teenagers and found no significant difference overall.[23] After a review of the literature, one researcher concluded that "most statutes are unknown to the majority of the population."[24]

To understand why knowledge of the criminal law is so poor, consider the way in which people learn the law. It does not take a social scientist to tell us that average people do not read the criminal code. One can speculate that people learn the criminal law, or what they think is the criminal law, not from the criminal code, but from friends and family, personal experience,[25] and traditional sources of public information such as schools,[26] newspapers, news magazines,[27] and television.[28] Even if the average person (or average newsperson) did read the code, the legal language makes comprehension unlikely. A later discussion of jury instructions illustrates this point.[29]

Certainly the criminal code does have an effect in those limited situations where a client asks an attorney whether certain proposed conduct is unlawful. This effect, however, is only present in a small

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to pay social security taxes for such part-time help. This occurred with Zoe Baird and Kimba Wood's nominations for Attorney General, Charles Ruff's nomination for Deputy Attorney General, and Stephen Breyer's nomination for the Supreme Court. *See* Richard L. Berke, *Judge's Friends Try to Save Candidacy for High Court*, N.Y. TIMES, June 14, 1993, at A11. Government officials and judges presumably know the law better than the public and these nominees for high office presumably were the better of their kind. If they do not know the law, how can we expect untrained, uninformed, and sometimes uneducated members of the public to know the law?

22. Saunders, *supra* note 21, at 716; *see* Note, *supra* note 21, at 1468.

23. Saunders, *supra* note 21, at 717.

24. FRANÇOIS-XAVIER RIBORDY ET AL., LEGAL EDUCATION AND INFORMATION: EXPLORATORY STUDY 29 (1986).

25. *See* Note, *supra* note 21, at 1475-76.

26. Stewart Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 LAW & SOC'Y REV. 185, 192 (1987).

27. Note, *supra* note 21, at 1476-77. While there is a positive correlation between reading newspapers and news magazines and legal knowledge, it cannot be stated definitely that people who read these publications gain their legal knowledge from these sources. This positive correlation does not prove that reading newspapers or news magazines imparts legal knowledge but may merely indicate that highly knowledgeable people read these publications even though they have gained their legal knowledge from other sources such as formal schooling. *Id.*

28. *Id.* at 1477-78; Valerie P. Hans & Juliet L. Dee, *Media Coverage of Law: Its Impact on Juries and the Public*, 35 AM. BEHAV. SCIENTIST 136, 141 (1991); *see also* DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS (1991) (reporting prosecutors' view that television programs about homicide prosecutions create expectations in jurors that can significantly affect trial outcomes).

29. *See infra* part II.A.1.

fraction of crimes committed. Furthermore, the counsel's advice may be based not upon what the code says, but rather upon what the attorney thinks is likely to happen at trial; and, as Section II.A.2 suggests, the result at trial may have little to do with what the code says and much to do with what the jurors and the community think the rules are or should be.

This picture of the state and source of the public's criminal law knowledge suggests two things. First, the code is rarely a direct or even indirect source of what people think the law commands. Second, perhaps because of this, public knowledge of criminal law is generally poor. Yet code drafters act as though what they write in the code will indeed alter people's conduct on the street. The more fanciful provisions are those like Model Penal Code section 3.04(2)(a):

> The use of force is not justifiable under [the self-defense] Section:
>
> > (i) to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful [but, according to the commentary, excessive force may be resisted because strictly speaking it is not force being used to effect the arrest[30]]; or
> >
> > (ii) to resist force used by the occupier or possessor of property or by another person on his behalf, where the actor knows that the person using the force is doing so under a claim of right to protect the property, except that this limitation shall not apply if:
> >
> > > (1) the actor is a public officer acting in the performance of his duties or a person lawfully assisting him therein or a person making or assisting in a lawful arrest; or
> > >
> > > (2) the actor has been unlawfully dispossessed of the property and is making a re-entry or recaption justified by Section 3.06; or
> > >
> > > (3) the actor believes that such force is necessary to protect himself against death or serious bodily harm.[31]

The drafters explain these provisions as "efforts to reduce . . . clashes of force."[32] The law is designed to encourage "judicial resolution of

30. MODEL PENAL CODE § 3.04 cmt. 3(a) (1985).
31. *Id.* § 3.04(2)(a).
32. *Id.* § 3.04 cmt. 3(a).

the legality of the arrest, rather than self-help."[33] The possessor of property "should take his claim to the property to court."[34]

But, as noted above, available data suggest that the average person to whom these provisions are directed—the person inclined to resist another's unlawful taking of property or to resist an unlawful arrest—will know nothing about the provisions. Indeed, if handed an index card with the provisions printed on it, the average person may still have little idea of what the provisions mean. Even if given a multi-page, in-depth explanation, including the official commentary describing the proper interpretation of the provisions, the average person still may be unable to understand the rules and, in any case, would be unable to apply them instantaneously in the difficult situations where such rules become relevant. Code drafters fool themselves when they formulate such provisions on the assumption that they will in fact govern people's behavior.

B. PROPOSALS

The public's failure to know the law is less the result of public indifference and more the result of the government's lack of systematic effort to make the law known. After enacting a statute, a legislature typically publishes it in the jurisdiction's statutes at large, which legislators and lobbyists read but which public libraries commonly do not have.[35] The assumption, apparently, is that somehow the word will get around.

If we are to take seriously the value of public knowledge of the law's commands, we ought to do something more toward meaningful dissemination. As to new prohibitions or requirements, it seems easy enough at the very least to publish the text in newspapers, to encourage news stories, and to make the text of new criminal laws available to the public at a variety of public institutions. If the post office has space for "wanted posters," why not make space to post the text of new or revised crimes for which people may end up wanted?

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33. *Id.*

34. *Id.* § 3.04 cmt. 3(b).

35. For a description of the legal dissemination requirements, see Joseph E. Murphy, *The Duty of the Government to Make the Law Known*, 51 FORDHAM L. REV. 255, 257 (1982) (concluding a need for more "effective means of making the law known beyond mere technical compliance with due process minimums"). For an example of the required "publication" procedures upon enactment, see N.Y. EXEC. LAW § 102(4) (Consol. & Supp. 1993) (requiring that laws be made available for inspection in various agency offices and included in official compilations, and that photocopies be available upon request for a fee).

The greater challenge is to teach the commands of existing law. Why not widely disseminate the laws in pamphlets, teach the law's commands to grade school students, and require high school students to pass a test of the criminal law's requirements? Educational programs might use factual situations that commonly arise or events recently reported in the press as vehicles for instruction.

One benefit of teaching the criminal code in school, beyond disseminating the code's provisions, is the message conveyed by the effort. The practice would reinforce the perception that society does indeed expect compliance. The resulting peer discussions in school also can have value. The tendency toward law abidingness is strong in most people.[36] Having discussions about the law may help students see that their peers share their views that law abidingness is a virtue. If community views are the most powerful compliance force, as Part II discusses, then public discussion may be the most powerful pedagogical force.

The recent rash of criminal-justice-related "reality" television programming might provide a hook for an adult educational system. If recent episodes of such popular programs as "LA Law" or "Cops" were the factual vehicles of instruction, viewers might well tune in to get an authoritative answer of what the criminal law has to say. Given the evidence that people learn what they believe is the law from the media, rather than from the code,[37] it would seem useful to have an authoritative and reliable source in that media, rather than leaving the last word with Hollywood writers. Further, a criminal law "truth squad" might encourage these more popular sources of legal education to be more accurate in their portrayals.[38]

One might be tempted to dismiss such a broad-based educational campaign—Criminal Law 101 for the entire country—as unfeasible. If first year law students, presumably admitted to law school because they have an aptitude for learning the law, find the process challenging, it might be argued that it is beyond the ability of the general public to learn the law. Of course, if that is our view, then we perpetuate

36. Sarat, *supra* note 21, at 19-20.

37. *See supra* notes 25-29 and accompanying text.

38. On issues on which states disagree, this could of course require descriptions of the alternative positions. But these public statements of differences are likely to focus legislative attention on them and, over time, may reduce the differences where they reflect poor drafting rather than genuine disagreements.

gross injustices by the thousands every day when we punish laypersons who have violated provisions of the law that we now argue is too difficult for them to learn.

The educational task is more feasible than one might initially think. Average members of the general public can fully understand what the law requires of them. Consider that it is not the entire criminal code that educators must convey. Perhaps only a fifth of the code contains rules of conduct, that is, provisions that the public must know in order to conform their conduct to the requirements of the law.[39] The remaining four-fifths is made up of provisions that address themselves primarily to the adjudicators: the prosecutors, judges, and juries. The latter provisions perform the other two primary functions of a criminal code: setting the conditions under which liability will be imposed for a violation and, if it is to be imposed, the general extent of the punishment.[40] There is little need for the public to know and apply these principles of adjudication.[41] If the time comes when they would need such knowledge (for example, when they become a member of a criminal trial jury) an expanded educational campaign can be undertaken then.[42]

Further, it is the principles of adjudication, not the rules of conduct, that make criminal codes complex and subjective. If stripped of these, the remaining rules of conduct could be briefly stated and made simple and objective in form. In short, widely distributed pamphlets could realistically state the rules in a form that the public could understand and remember. Most property offense definitions could be reduced to the following: "No person shall take, exercise control over, or transfer property of another without consent of the owner." Homicide offenses, likewise, could be reduced to the following: "No person shall engage in conduct that would create a risk of death to another

39. One-fifth is speculation upon very gross estimates. For example, if the "rule of conduct" against homicide is extracted, it is considerably less than one-tenth of the length of the entire murder provision. *See* Robinson, *Rules of Conduct*, *supra* note 19, at 759-69. On the other hand, homicide is one of the offenses most laden with adjudication principles and is not a typical offense. Most general part provisions of a code, however, are not part of the rules of conduct. *See* Robinson, *A Functional Analysis*, *supra* note 19, at 910. Without actually doing the rules-of-conduct drafting exercise, it is difficult to be more accurate. For an illustration of what a plain-language code of conduct would look like, see Paul H. Robinson et al., *Making Criminal Codes Functional: A Code of Conduct and a Code of Adjudication* (forthcoming 1995) [hereinafter *Making Codes Functional*].

40. Robinson, *A Functional Analysis*, *supra* note 19, at 857.

41. On the other hand, I think it dangerous to try to hide these rules from the public as others have proposed. *See infra* note 134.

42. The ways in which this process might be improved are the topics of the next section.

person." The rules of conduct must also tell citizens when they can engage in otherwise prohibited conduct. For example, a rule might state: "A person may defend oneself or another or one's property against another's unlawful force by using force against the aggressor that is necessary for defense and that is reasonably proportional to the harm threatened." The law not only prohibits some conduct and permits other conduct, it also requires certain conduct. Examples of such provisions include the following: "All parents and legal custodians of a child must protect the child's health and safety," and "all persons over the age of 18 must register with the Selective Service System."

Efforts at public education of the commands of the criminal law seem well worth the effort. Public knowledge is necessary if punishment is to have a deterrent effect. Knowledge of the realistic possibility of punishment is also essential if punishment for a violation is to come within our notions of fairness. Finally, better public knowledge helps the criminal law's adjudication function by providing better informed jurors and, in the longer term, results in more enlightened criminal codes by providing better informed legislators and voters.

II. CODE AS THE SOURCE OF THE GOVERNING LIABILITY RULES

A second function of a criminal code is to set the governing liability rules. What elements must be shown to prove an offense? When is a defense available? It is these rules, ideally, that determine whether a trier of fact will hold a defendant liable for an offense and, if so, for which offense. The code's rules are conveyed to the jury at trial through formal legal instructions given by the judge. With few exceptions, the jury's decision conclusively determines the outcome of a case whether it follows the legal instructions or not.[43] (In practice, most cases are resolved through plea agreement rather than jury trial,

43. A jury acquittal is in all instances binding. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 22.1, at 960 (2d ed. 1992) ("[A] jury verdict of not guilty is not subject to reversal or to review in any manner whatsoever."); Chaya Weinberg-Brodt, *Jury Nullification and Jury-Control Procedures*, 65 N.Y.U. L. REV. 825, 828 (1990). A judge can overturn a jury conviction and acquit a defendant only when " 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.' " United States v. Scott, 437 U.S. 82, 97 (1978) (alteration in original) (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1976)). While an actual acquittal by a judge bars further prosecution and appellate review, Sanabria v. United States, 437 U.S. 54 (1978), a defendant may be subject to retrial by another jury if a judge grants a defendant a dismissal of a jury's guilty verdict on "a basis unrelated to factual guilt or innocence of the offense of which the defendant is accused." *Scott*, 437 U.S. at 99.

but the dominant force in shaping a plea agreement is the assessment by each party of the likely outcome at trial.[44] If either party thinks that a trial offers a more attractive option than the plea bargain offered, all things considered, that party is likely to decline the bargain offered.)

A. Limitations on the Control of Liability Decisions

Jury power has prompted interest among social scientists in the way juries exercise that power. Scientists have accumulated a considerable body of evidence that suggests that a criminal code's rules have limited effect on jury decisions. Juries commonly do not understand the instructions that judges give them. If they do understand the instructions, they frequently are unable to remember them or apply them during jury deliberations. Even if they are able to apply them, they sometimes will not apply them if they do not agree with them. The truth is, the liability rules that juries apply at trial are not those of the code. The governing rules are the commonly incorrect or incomplete jury *perception* of the instructions, or the jury's own intuition of what justice demands, or a combination of the two.[45]

1. *Jury Comprehension of Legal Instructions*

In one study jurors were asked to paraphrase instructions that they had just heard. Jurors accurately restated 13% of the legally significant elements in their paraphrases; they never mentioned 85% of the legally significant elements; and they mentioned, but incorrectly stated the remaining legally significant elements.[46] Similar studies have shown that the same poor comprehension exists for legal instructions in civil cases.[47]

Another study used a different approach. It gave true-false questions about legal rules to instructed and uninstructed jurors. The

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44. *See* LaFave & Israel, *supra* note 43, § 21.1, at 898.

45. Adjudication rules applied by the judge rather than the jury are much more likely to have effect. Judges enforce, for example, statutory time limitations to bring prosecutions, and there is every reason to think that the code's rules are closely followed. "Nullification" by a trial court judge would bring an appeal and a reversal. Some jurisdictions similarly have judges adjudicate claims of an entrapment defense. *See, e.g.*, Model Penal Code § 2.13(2) (1985); Utah Code Ann. § 76-2-303(5) (1990).

46. Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. Rev. 77, 91 n.101 (1988).

47. *See* Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306 (1979).

extent of the superior performance of the instructed jurors gave an indication of the extent to which they understood the instructions.[48] The study found that for 63.6% of the questions, jury instructions had no statistically significant effect in increasing juror comprehension of the law.[49] In another study of similar methodology, instructed jurors had at best a 6% greater success rate than uninstructed jurors in correctly assessing the defendant's liability in a controlled test case.[50]

The issues on which the instructed jurors did better than the uninstructed jurors, which constituted 36.4% of the questions, included the simpler issues and, interestingly, issues on which the uninstructed jurors also did relatively well.[51] This is presumably because the legal instructions matched the uninstructed jurors' prior notions of what the law was or should be.[52] This connection between jury comprehension and existing views is further discussed later.[53]

The absolute level of comprehension by the instructed jurors was in many instances astonishingly low. Remembering that chance guessing will give a subject a 50% success rate on a true-false test, only 65.8% of the instructed jurors correctly answered that a defendant must have intended to kill the victim, rather than simply caused the victim's death, to be convicted of first degree murder.[54] Only 32.3% of the instructed jurors correctly answered that assault does not require actual physical injury.[55] Only 22.3% could correctly recall from the instructions that specific intent means that the accused must have planned to commit the offense.[56]

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48. Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REF. 401, 409-10 (1990).

49. *See id.* at 425.

50. Laurence J. Severance et al., *Toward Criminal Jury Instructions that Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 205-06 (1984).

51. Kramer & Koenig, *supra* note 48, at 421. One issue was voluntary manslaughter, where 89.3% of instructed jurors correctly answered the questions on the issue as compared to 67.6% of the uninstructed jurors. The second issue was whether second degree criminal sexual conduct always involves injury and penetration, where all instructed jurors correctly answered the questions on the issue as compared to 64.4% of the uninstructed jurors. *Id.* at 424.

52. *Id.* at 430. When a juror's preconceived notions are congruent with instructions, both uninstructed and instruction-benefitted comprehension levels are quite high. *Id.*; *see* Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 220-21 (1989).

53. *See infra* text accompanying notes 89-93.

54. Kramer & Koenig, *supra* note 48, at 420.

55. *Id.* at 423.

56. *Id.* at 422-23; *see also* Robert F. Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 B.Y.U. L. REV. 601, 615 (study found that 86% of uninstructed criminal juries were unable to respond accurately to questions regarding what is proof of guilt).

In practice, jurors do not operate in isolation. The authors of one study reasoned that it may not be necessary for every juror of every jury to understand an instruction. They attempted to account for this by defining what they took to be an acceptable level of comprehension short of perfection. They set two requirements as their measure of adequate comprehension of an instruction: First, two-thirds of the jury, eight of twelve jurors, must correctly comprehend the point of law; and second, eight out of ten juries must meet this two-thirds comprehension requirement.[57] Thus, under this criteria, an instruction could be judged sufficiently comprehended even if, in 80% of the juries, a third of the jurors, four of twelve, got it wrong; and, in the remaining 20% of the juries, all of the jurors got it wrong. There is some danger that such a standard may be too low. Every juror has an independent vote, and a verdict in a criminal case typically requires unanimity. In any case, under this proposed sufficiency criteria, only 16% of the instructions tested met the criteria of sufficient comprehension.[58]

One final source of jury error is seen in those studies that show the difficulty jurors have in retaining even those instructions that they may initially understand. In one study, the results showed that the jurors possessed a greater level of comprehension when tested immediately after being instructed. Jurors were less likely to accurately paraphrase instructions after deliberating than immediately after hearing the instructions.[59] This may result in part because deliberations with jurors who misunderstand the instructions can confuse jurors who have properly interpreted them. It also may be due in part to the passage of time; jurors are less able to remember the instructions over time. Juries commonly are not given a copy of the instructions to which they can refer during deliberations.[60]

2. *Jury Nullification*

Even if instructions could be created that were effective in communicating the legal rules to the jurors, would jurors follow them?

57. Amiram Elwork et al., *Toward Understandable Jury Instructions*, 65 JUDICATURE 432, 438 (1982).

58. *See id.*

59. Severance, et al., *supra* note 50, at 223. In the study, individual jurors who were questioned immediately following the judge's instructions correctly paraphrased the instructions 42% of the time, while individual jurors who were questioned after a 30-minute group deliberation correctly paraphrased the judge's instructions only 31.7% of the time. *Id.*

60. Charrow & Charrow, *supra* note 47, at 1310.

Studies suggest that jurors generally do take seriously their obligation to follow their instructions. One study estimated that 87% of juries discuss their instructions among themselves,[61] and that 57-65% reread them aloud (when given a written copy to take into the jury room).[62] Another study found that 25% of jury remarks during deliberations related to the instructions.[63] This result is similar to another study's finding that jurors devoted almost 10% of jury deliberation time to discussion of the instructions themselves.[64]

Nevertheless, conscious jury attention to instructions does not necessarily mean that juries apply them in the way the drafters intended. While giving formal deference, a juror may allow extraneous facts to affect his or her judgment or may "fudge" application of a legal standard to reach a result more consistent with the juror's sense of a fair and just result. Nonetheless, the juror may consider the result technically within the legal instructions even if it is not the most conscientious application of the instruction's intended meaning.

The most influential study in the area, published by Kalven and Zeisel in 1966, attempted to account for this possibility in judging the extent to which juries declined to follow instructions as given. They looked to the final result of the jury's decisionmaking process and asked the trial judges to assess whether that result was inconsistent with the jury's instructions.[65] The researchers concluded that jurors consciously or subconsciously "nullified" the law, that is, substituted their own values for those reflected in the legal instructions in 21% of jury trials.[66] This suggests a great willingness of jurors to ignore a code's provisions where they conflict with their own views. If one consciously overestimates the cases in which a juror would disagree with the law at say 50% of all cases, then a 21% nullification rate still suggests that a juror is willing to nullify in nearly half of the cases in

61. Steele & Thornburg, *supra* note 46, at 98. This study used a probability methodology which calculated that 87% of juries discuss their instructions with a 95% confidence interval estimate between 83% and 91%. The methodology accounted for the fact that jurors responding to questionnaires disagree over what takes place during deliberations. As a result, the 87% figure represents the "best estimate" of the probability that a typical jury discusses its instructions once the jurors' subjective responses are factored together. *Id.* at 97-98.

62. *Id.* at 98. The 95% confidence interval estimate that jurors reread their instructions was between 57% and 65%. The same methodology used to estimate the likelihood that jurors discuss their instructions, as detailed above in note 61, was used for this estimate.

63. REID HASTIE ET AL., INSIDE THE JURY 85 (1983).

64. Forston, *supra* note 56, at 609.

65. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 45-46 (1966).

66. *Id.* at 107-08, 116.

which the juror disagrees with the law.[67] This suggests that jurors are almost as likely to follow their own intuition as they are to follow a code's contrary direction.

Other studies can be interpreted to support this view of wide-scale jury nullification. In one study of jury decisionmaking in insanity cases, for example, jurors were presented with the same facts in each of five cases with a potential for an insanity defense. Each juror was given one of six widely divergent tests for the insanity defense.[68] The patterns of response were essentially the same among all jurors, no matter which instruction was given. This might suggest that the jurors are using their own intuitions rather than the legal instructions to decide the cases.[69]

Such a general willingness to nullify is inconsistent with our commitment to legality, of course. As juries more frequently nullify in cases where they disagree with the law's result, the law becomes increasingly irrelevant. It is the jury's collective intuition of justice that becomes the governing "law," leaving code provisions as the governing force in few cases. As with other failures to adhere to the legality principle, such *ex post, ad hoc* jury discretion creates unfairness to offenders who cannot know the governing "law" at the time of the offense. It increases the potential for abuse of discretion and reliance upon personal prejudice. It increases the likelihood of unwarranted disparity, as different juries treat similar cases differently (in part because different juries may have different views on whether to nullify). Finally, it creates unpredictability in the adjudication process, which in addition to being unfair to the defendant undercuts the deterrent message we seek to send to potential offenders.

One can argue that the empirical studies noted above do not necessarily lead to a conclusion of wide-spread jury nullification. Kalven and Zeisel's finding that juries frequently give results that trial judges say are at odds with their instructions may simply reflect the poor

67. If one speculates that the jury disagrees with the law's result in only 25% of the cases, a 22% nullification rate suggests that the jury almost always nullifies if it disagrees.

68. NORMAN J. FINKEL, INSANITY ON TRIAL 159 (1988). The insanity tests used were the wild beast test, *M'Naghten*, *M'Naghten* plus irresistible impulse, *Durham*, the American Law Institute's Model Penal Code test, and the disability of mind test. *Id.*

69. *Id.* at 160. When the case types are examined by their verdicts, the differences among the cases are large and significant. A majority of the jurors found that an insanity defense was appropriate for the epilepsy (69%), paranoid schizophrenia (68%), and stress-induced cases (74%) while inappropriate in the chronic alcoholic (13%) and split brain commissurotomy (48%) cases. *Id.*

level of jury comprehension documented above. Similarly, identical jury results, despite different insanity instructions, may simply confirm that the legal instructions do not convey meaningful and usable standards to the jurors.[70] Indeed, other studies independently confirm that lay subjects generally do not understand the distinctions among insanity instructions intended by judges and lawmakers.[71]

Several studies suggest that jurors follow their instructions. For example, some studies have shown that juries are more willing to nullify when judges tell them that they have such power and permit them to use it.[72] This suggests that absent such advice, juries feel more constrained to follow the instructions even if the instructions produce results contrary to their personal views.[73]

But assume that juries typically are inclined to follow their legal instructions and that contrary findings simply reflect poor juror comprehension and not poor jury adherence. Such a conclusion is hardly grounds for rejoicing. If the jury follows its instructions, or what it believes to be its instructions, the evidence recounted above showing poor jury comprehension suggests an ironic and tragic result: Jurors may suppress their own intuitions of justice to adhere to their oath as jurors, only to apply a mistaken perception of what the law requires. The result is that jurors apply rules of liability that mirror neither the code nor the community's notions of justice.

In some respects, the interaction of the poor comprehension and nullification problems create a no-win situation. If the jury does not follow its instructions, then we are left with lawlessness rather than

70. Finkel does not claim to draw conclusions about nullification from his results. Kalven and Zeisel do, but the data reviewed above (that demonstrates the poor comprehension that jurors have of their instructions) were unavailable to the researchers at the time of their study.

71. PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (forthcoming 1995).

72. Irwin A. Horowitz, *The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials*, 9 LAW & HUM. BEHAV. 25, 34 (1985) [hereinafter Horowitz, *The Effect of Jury Nullification Instruction*]; Irwin A. Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 LAW & HUM. BEHAV. 439, 450 (1988). In the United States, judges rarely tell juries that they have the power or permission to nullify. Currently, only two states allow judges to inform jurors that they have nullification power. Horowitz, *The Effect of Jury Nullification Instruction*, *supra*, at 26.

73. While not specifically addressing the issue of adherence to jury instructions, other studies have suggested that jurors tend to let their own values and attitudes influence their decisions in a limited number of cases, specifically where the evidence is weak. *See* Gary D. Lafree et al., *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389 (1985); Barbara F. Reskin & Christy A. Visher, *The Impacts of Evidence and Extralegal Factors in Jurors' Decisions*, 20 LAW & SOC'Y REV. 423, 436 (1986); Christy A. Visher, *Juror Decision Making: The Importance of Evidence*, 11 LAW & HUM. BEHAV. 1 (1987).

legality, unpredictability, potential for abuse, and unfair disparity among similar defendants.[74] On the other hand, if juries follow their instructions but misunderstand them, they fail to do justice as either they or the code envision it. In either case, the criminal code's ability to govern the liability rules applied at trial seems seriously compromised. Whether the reason is jury ignorance or jury independence, the result is the same: The criminal code has a limited effect in governing jury determinations.

From this perspective, much criminal code debate looks somewhat out of touch. A half-dozen or more major variations of the insanity defense, for example, exist in one jurisdiction or another.[75] Members of the legal community have devoted enormous energies to the controversy over the proper formulation of the defense, as if it makes a difference. The Model Penal Code drafters, for example, rejected the Royal Commission's proposal to leave it to the jury to determine whether "the accused was suffering from disease of the mind . . . to such a degree that he ought not be held responsible."[76] Such a formulation would not give the jury enough guidance, the drafters explained. "The Commission's standard . . . fails to focus the attention of the trier of fact on the specific manifestations and effects of mental disease or defect."[77] But the empirical data suggest that juries generally are oblivious to such subtleties in instructions and, even if judges could convey such nuances, the jury may well impose its own intuitive standard, whether instructed to do so or not.

B. PROPOSALS

Improving the criminal law's effectiveness in its second function—setting the rules for adjudicating liability—is more difficult than improving its public communication. Recall that the crux of the law's difficulty in adjudicating liability is the inability to accurately convey to jurors the liability rules that they must apply. Can we improve juror comprehension?

A number of researchers have developed methods of improving juror comprehension by rewriting instructions. Unfortunately, even with these improvements, the level of comprehension remains low.

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74. *See supra* text accompanying notes 69-70.

75. For a description of the major variations and the states that follow each, see PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 173(a) (1984).

76. ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 116 (1953).

77. MODEL PENAL CODE § 4.01 cmt. 3 (1985).

Most of the studies reported above tested rewritten instructions against their originals. One study, which had jurors paraphrase instructions after hearing them, showed a 91% improvement in comprehension rate, an impressive achievement.[78] Yet, under the improved instructions, subjects still only correctly paraphrased 23.6% of the legally significant elements, while immediately forgetting or not paraphrasing correctly 76.4% of the elements.[79] In another paraphrase study, it was still a poor 43% on average.[80] In several instances, jurors comprehended the rewritten instructions more poorly, which illustrates the difficulty and complexity of the clarification task.[81]

Recall that other studies used a true-false format to test the jurors' comprehension levels. These studies show similar results. In one study, the rate of correct answers was 75.7% with the standard instructions (versus 50% for chance). After revision, the comprehension rate for instructions rose to 77.2%, a somewhat less than dramatic 1.5% improvement in comprehension rate.[82] In another study, rewriting the instructions resulted in more significant improvement, but still only 53% of the legal instructions met the researchers' previously established criteria for "sufficient comprehensibility."[83]

Researchers have developed many techniques in drafting instructions that can improve jury comprehension. Judges and pattern jury instruction committees ought to use all of these techniques and look for more. In the end, however, it may be that judges cannot successfully convey some of the legal concepts used in adjudicating cases to laypersons through the current mechanisms used to instruct juries.

Pessimism about improvement in jury comprehension also comes from the current legal tests for reviewing the propriety of jury instructions. Legal correctness, not understandability, is the issue on review. Thus, there is little incentive and some considerable disincentive for judges to formulate instructions that maximize their clarity to laypersons. When a criminal case goes on appeal, the appellate court will

78. Steele & Thornburg, *supra* note 46, at 90-91.

79. *Id.*

80. Charrow & Charrow, *supra* note 47, at 1368.

81. *Id.* at 1350-52.

82. Severance et al., *supra* note 50, at 219 (mean error rate of 24.3% was reduced to 22.8%).

83. Elwork et al., *supra* note 57, at 438.

judge the trial judge's performance according to whether the instructions, under a lawyerly analysis, might give room for misinterpretation.[84] To avoid being reversed, a trial judge must give instructions that lawyers and judges will find correct in all respects. Writing an instruction that is defensible to attack by defense counsel on appeal is likely to generate a different instruction than one designed to most effectively convey the legal rule to laypersons.

For example, illustrative applications of a rule typically would be educational; most laypersons have little experience thinking purely in the abstract. As early as Macaulay's 1837 Indian Penal Code, code commentaries have included factual illustrations to help describe the operation of a rule.[85] If illustrations are useful to lawyers and judges in better understanding the drafters' intended meaning, would they not also be useful to jurors? Unfortunately, courts generally avoid illustrations for fear that some particular aspect of the illustrative facts could misled the jurors.[86]

Another reality of the current system is that defense counsel frequently may prefer an instruction that obscures or confuses a key issue, for that may be counsel's best chance at gaining an acquittal. Under a reasonable doubt standard, with the burden of persuasion on the prosecution, jury confusion operates to the defendant's benefit. This can be a problem when one considers that judges frequently will have a preference for an instruction submitted by the defense (if no preapproved pattern instruction is available). Even if a defense instruction is not the clearest way of describing the law to the jury, it may be preferred because, being proposed by the defense, it generally cannot be the basis for reversal on appeal.[87] Thus, unless incomprehensibility were subject to appellate review (for both defense and, on interlocutory appeal, for the prosecution), trial judges are not likely to risk reversal to gain comprehensibility. And it is doubtful that incomprehensibility will ever become subject to appellate review because, if

84. *See, e.g.*, Boyde v. California, 494 U.S. 370, 379 (1980).

85. INDIAN LAW COMMISSIONERS, PENAL CODE (1838).

86. For an illustration of the kinds of criticisms appellate courts frequently make, see United States v. Gleason, 616 F.2d 2, 14 (2d Cir. 1979).

87. A few appellate courts, however, have reversed even when the defense submits the instruction. *See, e.g.*, Paul H. Robinson, *A Proposal for Limiting the Duty of the Trial Judge to Instruct the Jury Sua Sponte*, 11 SAN DIEGO L. REV. 325 (1974).

it were, the social science data suggest that courts would find current instructions wanting in most cases.[88]

Things are not entirely bleak, however. One fact concerning juror comprehension has hopeful implications. As noted above, juror comprehension increases as the instructions more closely match the juror's own intuitions of the proper adjudication rule.[89] Jurors will more likely understand an instruction that codifies a principle that mirrors their intuitions, perhaps because the instruction need only identify or remind the jury of the concept; their prior knowledge provides the level of understanding that current instructions by themselves seem unable to provide. At the same time, a jury will not nullify an instruction that mirrors the community's views generally. Presumably juries will not resist, even in cases where they find the particular application less than popular, application of rules that reflect their own general principles.

Conversely, jurors will more likely misunderstand instructions that do not mirror their intuitions of justice, but, at the same time, will more likely nullify them. While nullification is generally something worth avoiding, the reverse is true when the likelihood of misinterpretation increases. As the likelihood of misinterpretation increases, we may wish to increase our tolerance (encouragement?) of nullification in order to avoid the dutiful injustice problem. It would be useful to have further study of the change of both comprehension and nullification rates as instructions are more or less divergent from the community view.[90]

If the apparent relationship bears out under further study, it suggests that one way of improving juror comprehension of, and adherence to, instructions is to give up trying to impose legal rules that conflict with the jurors' intuitive sense of justice. This, of course, suggests a fundamental change in the theory of criminal law, which is beyond the subject of this Article.[91] To note in passing, however, if this approach were taken, we might achieve maximum compliance

88. For a discussion and illustration of such incomprehensibility in the review of jury instructions, see Gacy v. Welborn, 994 F.2d 305 (7th Cir. 1993); United States *ex rel.* Free v. Peters, 806 F. Supp. 705 (N.D. Ill. 1992), *aff'd in part, rev'd in part*, 12 F.3d 700 (7th Cir. 1993).

89. *See supra* notes 51-52 and accompanying text.

90. Of course, this kind of research requires research into the community's views on the issues to which the test instructions apply. *See generally* ROBINSON & DARLEY, *supra* note 71 (reporting such research).

91. For a further discussion see *id.* ch. 1.

with such instructions if judges explicitly told jurors that the instructions were in fact constructed to mirror the community view and that this was done not by drafters guessing what the community wanted, but by social scientists seriously working to discover and articulate those views.[92]

It may be that with the significant level of jury confusion and misunderstanding of instructions, most juries now simply revert to liability rules derived from their own shared intuitions of justice. Unfortunately, little is now known about these views with any assurance. While social scientists have begun to discover and articulate these shared notions of justice,[93] these articulations are not generally available to either judges and lawyers or to the public. By drafting the code to instantiate the community's views, the system might well articulate for the first time the liability rules that have in fact been in force at criminal trials.

Among other things, the use of community-derived liability rules would create the predictability of outcome and uniformity in application that the current practice lacks. It would also provide an opportunity for debate over the actual liability rules, rather than the current debate over code provisions that have limited real world effect. If an existing rule, reflecting actual community views, is in fact judged objectionable by criminal law reformers, they are on notice that a public education campaign is needed to change the community's view or, at the very least, to call the discrepancy between community intuition and law to the public's attention.

Even without this fundamental change—shifting to liability rules that mirror shared community notions of justice—several measures would improve jury adherence to the code's instructions within the current system. First, judges typically read lengthy legal instructions aloud to jurors.[94] By giving juries written copies of their instructions, which they could take into the juryroom, jurors would not have to depend on their imperfect memories. Second, judges typically do not give legal instructions until after the presentation of evidence is complete.[95] Rather than waiting until all evidence has been presented (by which point some jurors may have already made up their minds),

92. See *id.* for an example of how this work might be done.

93. *Id.*

94. Charrow & Charrow, *supra* note 47, at 1310.

95. Larry Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 LAW & HUM. BEHAV. 409, 412 (1989).

judges could provide the relevant legal rules at the beginning of the trial. Jurors could then know what facts are relevant and how they are relevant as they hear the testimony.

Giving the governing legal rules at the beginning of trial also allows the jurors to consider the wisdom and fairness of the rules in the abstract, before they see their application to the case they are about to hear. If the rule seems fair in this uncolored context, jurors may well be more willing to defer to it even if it generates a result to which they are not entirely sympathetic. For example, studies suggest that jurors are more inclined to acquit handsome and charming defendants and defendants who are more like themselves than they are to convict defendants who are not.[96] A prior sense that the rule is fair, developed before jurors come to know the defendant, might help them resist this prejudice.

In the same vein, it might be useful for judges to anticipate the kinds of things that might distract jurors from the proper application of the liability rules. For example, jurors may tend toward imposing liability, despite their conclusion that a defendant is blameless in the case at hand, if they fear that the defendant may be dangerous and may require confinement (as with an insane offender).[97] Where the issue at a criminal trial is an actor's responsibility for his or her conduct, that and that alone should govern the outcome. Instructing jurors that issues of the defendant's future dangerousness are not relevant and that civil commitment is available to protect society from acquitted defendants who are dangerous, allows jurors to focus, as they should, on the issue of responsibility. Unfortunately, some courts have chosen to do the opposite; that is, they expressly prohibit a trial judge from telling a jury that civil commitment is available to confine a dangerous defendant acquitted at trial.[98] This seems to invite juries to take account of future dangerousness when only past wrongfulness is properly their focus.

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96. *See, e.g.*, JEFFREY T. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY 166 (1987); VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 139-40 (1986); Robert J. MacCoun, *The Emergence of Extralegal Bias During Jury Deliberation*, 17 CRIM. JUST. & BEHAV. 303, 308 (1990) (juries are more likely to acquit attractive defendants than unattractive defendants).

97. Indeed, this is the underlying assumption of the "guilty but mentally ill" verdict. *See* Paul H. Robinson, *The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693 (1993).

98. *See* United States v. Sharon, 52 Crim. L. Rep. (BNA) 1378 (5th Cir. 1993) (prohibiting judges from disclosing to juries mandatory commitment upon acquittal).

Requiring juries to enter special findings on the issues that logically lead up to their general verdict would be another possible reform, albeit rather dramatic and no doubt controversial. Historically, courts have opposed the use of special verdicts, specifically because it intrudes upon the jury's independence.[99] One can imagine a special-verdict-like system, however, that strikes some balance between giving a jury guidance and allowing the jury to retain its authority to render whatever verdict it feels is best. For example, one could require a jury to answer specific factual questions on the intermediate issues leading to a verdict, thus guiding the jury in its decisionmaking process, even if those answers were not publicly reported with the verdict. Even under current practice, a judge could write legal instructions in a way that walks the jury through its decisionmaking process. Indeed, there is even some slim precedent for formal special findings and verdicts. The verdict of "not guilty by reason of insanity," for example, as distinct from the "not guilty" verdict, specifically compels a jury to publicly address the issue of the defendant's legal insanity.[100]

A final source of improvement of jury performance may come from the reforms proposed in the previous section, concerning improved legal education of the general public. To the extent that jurors enter the box with a good understanding of what the criminal law commands, that burden is lifted from the quick-study program that jurors must master before they can decide the case at hand.

III. CODE AS THE DETERMINANT OF THE RANGE OF PUNISHMENT

One final function of the criminal code is to provide a "first cut" at the amount of punishment that a court ought to impose upon a defendant found guilty. The criminal code defines several "grades" or "classes" of liability, each grade carrying a different range of punishment. The code then categorizes all offenses and degrees of an

99. Heald v. Mullaney, 505 F.2d 1241 (1st Cir. 1974), *cert. denied*, 420 U.S. 955 (1975); United States v. James, 432 F.2d 303 (5th Cir. 1970); United States v. Gallishaw, 428 F.2d 760 (2d Cir. 1970), *cert. denied*, 403 U.S. 906 (1971); United States v. Spock, 416 F.2d 165 (1st Cir. 1969); CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 512 (1982).

100. Similarly, when a defendant advances a mitigation of extreme emotional disturbance in a murder prosecution, the jury verdict form typically gives both second degree murder and the extreme-emotional-disturbance mitigation to manslaughter as alternative verdicts. This thus requires jurors to put their determination on the record as to whether the defendant has satisfied the elements of the murder charge and the mitigation. For an example of a limited special verdict system, as proposed here, see *Making Codes Functional*, *supra* note 39.

offense into one of the grades. The harmfulness of the conduct, the degree of the actor's culpable state of mind (for example, purposeful, knowing, reckless, or negligent), the existence of mitigating factors (for example, extreme emotional disturbance), and other factors can alter the grade of liability. The sentencing judge refines the offense grade's general assessment of the amount of punishment when the judge decides upon a particular sentence.

Like the two functions discussed above—announcing the law's commands and setting the rules for assessing liability—the grading function is appropriately a code function. That is, it is properly set by the legislature and applied by a jury. The amount of punishment to be imposed is in large measure a function of the value of the interest injured or threatened and the culpability of the act. In a democracy, the former, the relative value of the interest, is a judgment uniquely within the authority of a legislative body. The latter, the actor's culpability, which necessarily requires an inferential judgment, is a judgment within the expertise of a jury of peers.

It is certainly the case that a criminal code cannot take account of every factor that contributes to the amount of punishment a defendant deserves. It is for this reason that codes generally give only an approximation of the amount of punishment that should be imposed. The judge must determine the exact amount on the facts of the particular case, which requires exercise of judicial discretion to refine the code's "first cut," or to account for relevant factors not taken into account by the code.

Once the judge determines the amount of punishment, it is the judge again who is best suited to determine how the court should impose that amount of punishment. A fine may be best in one case while community service may be better in another. Notions of desert do not constrain the method of punishment, as they do the amount of punishment.[101] One punishment method may be more effective than another, in any given case, at minimizing future crime. The determination of punishment method requires expertise that we can only expect a judge to have, not a jury. And only judges, not legislatures, can be expected to take account of the unique set of facts in the individual case.

101. For a discussion of the distinction between the amount of punishment and the methods for imposing it, and the implications of the distinction, see Paul H. Robinson, *Desert, Crime Control, Disparity, and Units of Punishment*, *in* PENAL THEORY AND PRACTICE: TRADITION AND INNOVATION IN CRIMINAL JUSTICE 94-95 (Antony Duff et al. eds., 1993).

In addition to providing legislative and jury input on the amount-of-punishment issue, the use of a statutory grading system rather than *ad hoc* judicial determinations has the advantage of providing greater uniformity in sentencing. Where judges have no restriction, similar offenders committing similar offenses may receive different amounts of punishment simply because they appear before different judges. Generally, an offender's punishment ought to depend on what the offender has done and not on the judge the offender happens to draw. Disparity concerns are at the heart of the recent trend toward sentencing guidelines. I will discuss these concerns later in this section.[102]

A. Limitations on the Control of Punishment Range

Is the code's grading scheme effective in setting the general range of punishment? A brief examination of the sentencing decision as it has traditionally been practiced for the past four decades, and is still practiced in most states, provides a starting point. Under the traditional system, the punishment range attached to a particular grade typically sets only a maximum sentence. The minimum sentence that a sentencing judge can give is no sentence (for example, unsupervised probation).

Such a system made sense in the 1950s and 1960s, during a period of optimism that advances in the social sciences would make "punishment" no longer necessary. Rehabilitation could do away with crime. A court could not determine the length of a therapeutic program beforehand because its length depended upon how the offender progressed during the treatment. Thus, all sentences logically had to be fully indeterminate. However, no jurisdiction still adheres to such a rehabilitation theory or uses such fully indeterminant sentencing. Many jurisdictions have nearly fully determinant sentences in the sense that an offender knows at the time the court imposes the sentence the amount of time likely to be served (absent criminal or disciplinary violations while in prison).[103]

Grading practice simply has not kept up with changing theories of punishment. With the shift away from rehabilitation and toward

102. *See infra* text accompanying notes 112-14.

103. Under this system, typically based upon a theory of the sentence as punishment rather than rehabilitation, there no longer may be good reason to defer to judges. The community, in the form of the jury, can better determine the amount of punishment deserved. Even if utilitarian theory of deterrence were the underlying principle, normal principles of deterrence would suggest that a prior public, that is, legislative, determination of the sanction is preferable to an *ad hoc* discretionary judgment by each sentencing judge.

determinant sentences, it no longer makes sense to vest complete discretion in the sentencing judge and to retain the limited legislative and jury role in assessing the grade of an offense. Yet the traditional maximum-only statutory schemes do just that. The jury may agonize over, for example, whether the defendant deserves the code's mitigation for extreme emotional disturbance (which would reduce murder, a first degree felony with a maximum of life imprisonment, to manslaughter, a second degree felony with a maximum of thirty years). Yet, even if it decides against the mitigation, the sentencing judge is entirely free to impose a sentence well below the statutory maximum authorized for the second degree felony. Indeed, despite the jury's determination, the court might impose a sentence equal to the maximum for a second degree *misdemeanor*: six months, or less.[104] (In many jurisdictions, both the sentencing judge and a parole commission determine how much prison time an offender will actually serve.)[105]

Judges (and parole commissions) not only have the discretion to impose a sentence that falls in the range for a lower grade, but generally exercise their discretion to that effect. A typical American statutory grading scheme is as follow:[106]

Grade	Maximum
1st degree felony murder	life or death
2nd degree felony (manslaughter, kidnapping, rape, arson)	thirty yrs.
3rd degree felony (robbery, burglary)	fifteen yrs.
4th degree felony (negligent homicide, possession of stolen property)	seven yrs.
5th degree felony (bigamy, unlawful detention)	three yrs.
1st degree misdemeanor (child non-support, resisting arrest)	one yr.
2nd degree misdemeanor (bad check)	six mos.

104. *See infra* table accompanying note 106.

105. It is common for an offender to be eligible for release after serving one-third of the sentence that the sentencing court imposed. *See, e.g.*, 18 U.S.C. § 4205 (1988) (repealed by Sentencing Reform Act of 1984, which created the United States Sentencing Commission and moved to determinant sentencing); CAL. PENAL CODE § 3049 (West 1982).

106. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-701, 13-707 (1989); ARK. CODE ANN. § 5-4-401 (Michie 1987); ILL. ANN. STAT. ch. 720, paras. 51/2-7 to 5/12-11 (1993 & Supp. 1994); N.Y. PENAL LAW §§ 70.00-.15 (1987 & Supp. 1993); VA. CODE ANN. §§ 18.2-10 to 18.2-11 (Michie 1988).

Compare these maximum terms to the median time served for the more serious offenses:

Offense	Median Time Served of Those Imprisoned*[107]	% Not Imprisoned[108]
Murder	five yrs. six mos.	19%**
Manslaughter	four yrs. four mos.	19%**
Kidnapping	two yrs. two mos.	40%
Rape	three yrs.	25%
Arson	one yr. five mos.	67%
Robbery	two yrs. three mos.	37%
Burglary	one yr. one mo.	60%
Negligent homicide	one yr. nine mos.	19%**

* The medians of time served are artificially high because they reflect the median time served only by those persons sentenced to state prison. All categories of offenses had offenders sentenced to probation or probation and some local jail time (of less than a year), whose less severe sentences are not reflected in the median time-served figures. The right-hand colum gives the percentages of such offenders not sentenced to state prison.

** Of all homicides.

As the tables show, the typical murderer serves a sentence that a court would be authorized to impose for a fourth degree felony, such as possession of stolen property or negligent homicide. The court could impose the median time served for rape (three years), for a fifth degree felony such as unlawful detention or bigamy. This Article does not suggest that judges generally impose sentences that are too low. Rather, it suggests that commonly the sentence imposed for an offense need not be a function of the offense's grade under the criminal code. The sentencing judge's (and parole commission's) intuitions of justice govern, not those of the code.

To reduce judicial sentencing discretion, some jurisdictions have adopted mandatory minimum sentences that set a floor below which a sentencing judge cannot go. This device does indeed give codes an effect in determining the amount of punishment imposed, but few offenses in the code invoke it.[109] Considerable evidence also shows that where a criminal code imposes a mandatory minimum, the parties

107. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, 1991 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1991 tbl. 5.57, at 549 (Timothy J. Flanagan & Kathleen Maguire eds., 1992) ("Sentences Received in 14 States").

108. *Id.* tbl. 6.125, at 693 ("First Release from Prisons in 35 States").

109. For example, of the thousands of criminal offenses in the federal code, something over 100 contain mandatory minimums. *See* Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 201 (1993). And the federal system is generally one of those in which mandatory minimums are most common.

frequently subvert its effect by having the offender plead to another similar offense that does not carry a mandatory minimum.[110] (There frequently is good reason for the parties to subvert the operation of a mandatory minimum. Mitigating factors commonly exist that make the case at hand inappropriate for a sentence of that severity. Yet, current codes rarely adjust the mandatory minimum sentence for such mitigating factors.)

One may be inclined to think that, although the code is irrelevant in determining where, on the discretionary range, a judge will impose the sentence, it does at least have a real effect in limiting judicial discretion by capping how high the sentence may be. In other words, although judges can give a fourth degree felony sentence to a first degree felon, they cannot give a first degree felony sentence to a fourth degree felon. This is true, of course, but only in a technical sense.

In reality, there are few offenses for which the statutory maximum presents a genuine limitation on the sentence that a sentencing judge may want to impose. In setting the statutory maximum under our current scheme, the legislature must set it high enough to cover the most extreme, most egregious form of the offense, the rare and exceptional case. But that means that for all but this rare and exceptional case, the statutory maximum is too high. The proper range of punishment for the more typical violation may properly center on one-third of the maximum, or one-half, or two-thirds. No one can be sure. Because current codes tell us only the statutory maximum, we can only guess about where along the continuum of punishment the legislature thought the typical case should fall. The statutory maximum for a fourth degree felony may be sufficiently high in real terms that a judge really can give a fourth degree felon a sentence appropriate for a first degree felon. For example, a judge (and parole commission) could lawfully insist that a defendant convicted of a typical case of possession of stolen property, commonly a fourth degree felony, serve the statutory maximum of seven years. Yet, this would exceed by one year and six months the time served by the typical murderer.[111]

110. *Id.* (noting that the federal code contains more than 100 separate mandatory minimum provisions but "the great majority of these mandatories are seldom or never used. . . . [J]ust four of these statutes accounted for ninety-four percent of [the cases in which a judge imposed a mandatory minimum.]").

111. *See supra* tables accompanying notes 106-08.

Overall, the code's influence on setting the general range of punishment is minor. The relative influence of the code versus a judge in sentencing is similar to the relative influence of the code versus a jury in assessing liability. Like the jury's reliance upon its own intuitions of justice rather than the code's rules, the sentencing judge's (or parole commission's) personal judgment of the appropriate sentence, not the grading judgements in the code, determine an offender's punishment.

Because of the problems and inequities that come from such judicial sentencing discretion—the potential for abuse of discretion from personal prejudice, unwarranted disparity between similar cases, unpredictability that undercuts deterrence, and the exclusion of community views—the last decade has seen many jurisdictions move to guide or limit such discretion. However, jurisdictions have not made this move by making the criminal code more influential. Instead, sentencing commissions and sentencing guidelines have been created that set more narrow ranges within which judges may exercise discretion.[112] The more narrow ranges typically do not simply rely upon the distinctions that the code defines and that parties litigate at trial, but rather upon new factors and distinctions that the sentencing guidelines introduce. Many of these guideline systems do have real effect, especially those that are binding rather than advisory and specific rather than general. The guidelines of the U.S. Sentencing Commission are the most prominent example.[113]

Such sentencing guidelines can do much to reduce the problems that unbounded judicial discretion created. Criminal codes, however, remain irrelevant under the guidelines. The guidelines, rather than codes, set the general range of sentences, and this is problematic. Unlike under codes, a jury does not determine the factors that affect the classification of an offense or offender under guidelines. Why is it that articulated sentencing factors ought to be treated differently than a code's grading factors? As I have argued elsewhere,[114] it is a strange system that shows great devotion to legality and procedural fairness at trial, where the focus is on the criminal code but ultimately affords little weight to legality and procedural fairness in determining the

112. For example, in the federal guidelines, the maximum of the guideline range may not exceed the minimum by more than 25% of the minimum. 28 U.S.C. § 994(b) (1988).

113. Under the federal guidelines, if and only if the sentencing court gives a sentence outside the applicable guideline range, the sentence is subject to appellate review. 18 U.S.C. § 3742(a)(3), (b)(3) (1988).

114. Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393 (1988).

amount of punishment. Where the range of punishment is really set, in application of the sentencing guidelines, the devotion disappears.

A cynic might suggest that the system is designed to create the appearance of legality and procedural fairness without in reality delivering it. I am inclined to think, instead, that the system has gone overboard at the trial stage and therefore finds it impossible to apply the same standards at the sentencing stage. The better approach may be to reconsider whether we ought to incorporate the factors used in sentencing guidelines into the code and to find a middle ground for the procedures that should apply to grading factors. If there are distinctions to be made in the procedures that apply, it might be better to distinguish between, first, liability assignment; second, determination of the amount of punishment; and third, the method of punishment—not the current somewhat arbitrary distinction between the code's grading factors and the sentencing guideline's categorization factors.

The primary point here is that codes do not have the effect in setting the range of punishment that drafters assume they do. Members of the legal community devote much energy to assessments of whether to classify an offense in this grade or the next.[115] They debate the exact formulation of mitigations with competing arguments as to how to best determine when an offender should get a reduction in grade. Typical is the Model Penal Code's extreme emotional disturbance doctrine, which reduces murder one grade to manslaughter. It represents a dramatic rewrite of the common law provocation defense and has been the subject of much academic and reform controversy. But, as the previous discussion illustrates, whether a trier of fact holds an offender liable under one grade or the next has little practical effect on the sentence that most sentencing judges have the discretion to give.[116]

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115. *See, e.g.*, MODEL PENAL CODE § 210.3 cmt. 9, at 78 (1985) (survey of the then existing penalty ranges for manslaughter).

116. At the same time, like many doctrines of mitigation (and aggravation), extreme emotional disturbance is a complex and subtle concept, which raises again issues of jury comprehension and application. The Model Penal Code's formulation, for example, calls for the jury to judge the actor by the standard of a reasonable person in the actor's "situation." MODEL PENAL CODE § 210.3(1)(b). The commentary goes on at some length about the flexibility in the term "situation" and the many opportunities it presents to take account of the special circumstances and characteristics of the actor. *See, e.g.*, MODEL PENAL CODE § 210.3 cmt. 5, at 62-63, 72-73. See also an earlier discussion of the same term with the same purpose in the context of the definition of "recklessness" and "negligence." MODEL PENAL CODE § 2.02 cmt. 4, at 242. And it is clear that the drafters do indeed contemplate that jurors will understand and apply the section. "Section 210.3 . . . leaves the ultimate judgment to the ordinary citizen in the function of a juror assigned to resolve the specific case." MODEL PENAL CODE § 210.3, at 63. It seems doubtful,

B. PROPOSALS

One could give the code significant influence in setting the range of punishment by incorporating into the code the kinds of factors and narrow penalty ranges that some sentencing guidelines presently contain, such as the comprehensive and binding guidelines of the federal system. No doubt there is a limit to how comprehensive the legislature can make the code, just as there is a limit to how comprehensive the commission can make sentencing guidelines. But, if a relevant factor and its proper effect can be sufficiently articulated for use as a binding sentencing rule, why not for use as a code provision?

Current practice clearly distinguishes between code grading factors and sentencing guideline factors. A jury determines the former, and must apply a higher standard of proof, while a judge determines the latter, using a lower standard of proof. But what arguments can one make for such a difference in treatment? Why should not a jury determine a fact that directly affects a defendant's punishment? Once the system recognizes that a jury should determine some factors relating to the amount of punishment, as it now does in the form of offense grades, it becomes more difficult to argue that a jury ought not determine other factors capable of articulation.

One may rationally distinguish factors that go to liability assignment and those that go to the range of punishment. Further, one may conclude that the standard of proof for the former ought to be higher.[117] After all, the liability decision controls the condemnation of criminal conviction, the central distinguishing feature of criminal law.[118] But if this is taken as the ground for requiring a lower standard of proof for sentencing factors, current practice requires reform.

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however, that the average juror will appreciate, without an opportunity to study the commentary, that so much can be made of the small word "situation." For the reasons described in the previous section, even if the code gave the jury some real say in determining the range of punishment by giving real effect to the offense grade, it is likely that it would be the juror's intuition rather than the code's conception that would determine the offense grade.

117. On the other hand, some argue that the standard of proof ought be no different. *See* Joseph P. Sargent, Comment, *The Standard of Proof Under the Federal Sentencing Guidelines: Raising the Standard to Beyond a Reasonable Doubt*, 28 WAKE FOREST L. REV. 463 (1993).

118. This seems to be the crux of the distinction the Court supported in McMillan v. Pennsylvania:

> Quite unlike the situation in those cases, criminal sentencing takes place only after a defendant has been *adjudged guilty* beyond a reasonable doubt. Once a reasonable-doubt standard has been applied *to obtain a valid conviction*, "the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him."

477 U.S. 79, 92 n.8 (1986) (emphasis added).

Under our current system, the criminal code contains both minimum-requirements-of-liability factors and grading factors, and the code subjects both to the same standard of proof. If we were to base the difference in treatment upon the liability-punishment distinction, it would require the drafting of both a "criminal liability code," which would assess liability under the higher standard, and a "sentencing code," which would determine the punishment range on facts determined under the lower standard.

IV. WHAT DO CODES DO?

If codes do not perform these most obvious functions—announcing the rules of conduct, setting the rules for adjudicating liability, and assessing the range of punishment—or at least not with the effect that we had thought, why do drafters and scholars argue among themselves about code provisions as if they do matter? Why do legislatures have impassioned disputes over criminal code reform, sometimes ending in deadlock because both sides are adamant about their position? Have the parties to reform simply deluded themselves about the value of their work? Or is it that code formulations and the process of drafting them serve functions other than those of which we traditionally think?

Some evidence exists to support the delusional theory. Legislative reports and scholars previously quoted illustrate the common but false assumption that criminal code provisions have the direct effects that previous sections show they do not.[119] This gulf between widely held belief and reality is not uncommon in the realm of criminal justice. People are known to believe, for example, that the insanity defense is commonly an issue in criminal trials. One study found that people thought that 37% of all defendants charged with crime pled not guilty by reason of insanity.[120] In reality, an insanity plea is exceedingly rare, raised in less than 1% of felony cases.[121] This more

119. *See supra* text accompanying notes 32-34 (concerning limitations on the use of defensive force); *infra* text accompanying notes 120-21 (concerning competing formulations of the insanity defense); *supra* text accompanying note 104 (concerning grading judgments and doctrines of grading, such as extreme emotional disturbance).

120. Valerie P. Hans, *An Analysis of Public Attitudes Toward the Insanity Defense*, 24 CRIMINOLOGY 393, 406 (1986).

121. Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY L. 331, 334 (1991). Note that this is less than one percent of all *felony* cases, while the lay subjects estimated insanity pleas for 37% of all persons charged with any crime. *See also* Richard A. Pasewark & Hugh McGinley, *Insanity Plea: National Survey of Frequency and Success*, 13 J. PSYCHIATRY & L. 101 (1985) (reporting median rate of one plea per 873 reported crimes). Callahan reports that an average acquittal

than thirty-eight-fold exaggeration of the practical significance of the insanity defense no doubt fuels the public's and its legislators' sense that proper formulation of the insanity defense is of great practical importance.

A similar kind of misperception concerns the crime rate. People typically overestimate the amount of crime in their own city by a large amount. Eighty-two percent of those polled in one study believed the crime situation was getting worse.[122] In reality, the rate of most kinds of crime is down or stable from what it was a decade ago.[123] This exaggerated sense of a rapidly deteriorating crime problem similarly may lead legislators to think criminal code reform is of greater importance than they might otherwise. If people can so easily be wrong about such real-world issues, perhaps they are similarly deluded about the practical effect of criminal codes.

But it hardly seems possible that people could have so broadly shared such delusion for so long. It seems unlikely that battalions of criminal code reformers have been operating for a century under a delusion that their work had value when it in fact had little. Given that the cycle of concern, reform, effect, and evaluation has occurred many times, one would think that, even without the recent social science data, the players would have a sense of whether the task was worth the effort. Over time, as the lack of practical effect of prior code reform becomes clear, one would expect less devotion to further code reform.[124] Whatever their intuitive doubts may have been, current reformers all over the world presumably have concluded that code formulations are indeed worth fighting about. Why?

Even if codes lose much in application, they have some effect in their traditional functions, albeit less than we may have thought. To a limited extent, jury instructions do influence a jury's liability conclusion. Abolishing an insanity defense, for example, makes it harder for a jury to acquit a defendant that it thinks is so mentally ill as to not be

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rate for an insanity plea is 26%. Callahan, *supra*, at 334. Pasewark and McGinley report a success rate of 15% of pleas. Pasewark & McGinley, *supra*, at 106.

122. Fred Strasser, *Crime in America: One Nation, Under Siege*, NAT'L L.J., Aug. 7, 1989, at S2.

123. *See, e.g.*, Fred Strasser, *Crime in America: It's Not as Bad as People Think*, NAT'L L.J., Aug. 7, 1989, at S16. However, the crime rate is dramatically higher than it was four decades ago. *See generally* Paul H. Robinson, *A Failure of Moral Conviction?*, 117 THE PUB. INTEREST 40 (1994) (reviewing the increase in various kinds of crime between 1955 and 1993).

124. Unless, perhaps, the code and its formulations had greater effect in the past. This seems unlikely, however, because little in earlier practice suggests that the law did a better job in educating the public, in instructing jurors, or in limiting judicial sentencing discretion.

responsible for the offense and is beyond condemnation and blame. To reach the result it wishes, absent an insanity defense, the jury must blatantly violate its oath to apply the law, and some juries will hesitate to do this. The absence of a recognized defense leaves the jury less room to fudge to reach its desired acquittal in a manner that is colorably consistent with its instructions.[125]

In some respects, the criminal code also influences a sentencing judge's options, although again less than we generally think or advertise. The class of an offense tells the judge the legislature's view of the relative degree of seriousness of an offense. While this assessment may not bind judges, and they are free to substitute their own assessment, many judges will find this kind of information influential and will sentence accordingly. In addition, on extremely egregious facts, a very stern judge may find that the statutory maximum does in fact prevent the severe sentence that he or she wishes to impose. Finally, the use of mandatory minimum sentences may have an effect, even if the participants frequently subvert them. If nothing else, their existence gives prosecutors leverage in plea negotiations that they would not otherwise have.

To summarize, a criminal code can play a large role in the adjudication of the unusual case and can influence, if not control, other cases.[126] But even these effects come from the grossest aspects of a code: whether the code adopts an insanity defense or a mandatory minimum. They have little or no relation to the particular formulation of a code provision: the particular definition of murder or of an insanity defense. Yet issues of formulation are the matters of dispute and account for many of the code reform efforts stalled by controversy. People may well have reason to dispute whether to adopt a mandatory minimum sentence or the classification of an offense. But

125. Similarly, the absence of a mitigation for mistaken justification, as in a doctrine of imperfect self-defense, prevents the jury from taking an easy path away from liability for first degree murder (hence the typical prosecutor opposition to such doctrines, as in New York and New Jersey). Thus, the law has an effect by giving the jury two bad choices and compelling them to pick by choosing what they find the least offensive rather than the most just. By conceptualizing the jury's decision as one of either "guilty" or "not guilty," the doctrine forces juries to pick between what they may see as two unattractive choices. *See* Paul H. Robinson, *"Not Guilty" Isn't Always "Innocent"*, CHI. TRI., Feb. 8, 1994, at 18. The doctrine mirrors this dichotomy in the way it formulates doctrines, such as in combining objective and mistaken justifications.

126. It is hard to see that codes have any effect in their function of communicating the law's commands. One might well speculate that the current poor state of public knowledge of criminal law is no better than that of earlier generations in which criminal law was not codified. It would be an interesting sociological study to compare between jurisdiction the knowledge level when modern codes are in force with the knowledge level when no codes are in force.

once we have a murder offense, for example, does the particular formulation matter enough to justify the disputes over it? Once we decide to have an insanity defense, why the fervent arguments over its formulation? Is it simply that politicians and lawyers are contentious people? They may be, but other explanations may be more persuasive. Specifically, codes and code reform may serve three functions other than the most obvious and direct functions discussed above.

A. Code As Judicial Guide for Admission of Evidence

The studies discussed above suggest that, because of either misunderstanding or defiance, a jury may act rather independently of the law in reaching a verdict and the code's influence in affecting trial verdicts is minor. On the other hand, the code's liability rules serve as the judge's touchstone for determining what facts are legally relevant. In this way, the code determines what evidence the jury will see and hear. If an insanity defense formulation allows a defense for cognitive dysfunction, but not for control dysfunction, then the judge properly excludes from presentation to the jury testimony concerning control dysfunction.[127] In other words, while the jury may be insensitive to differences between insanity defense formulations as reflected in jury instructions, the code's selection of a particular insanity formulation nonetheless shapes the jury's verdict because the trial judge uses this selection as the test of relevancy in screening the evidence presented to the jury.

As with other functions discussed above, the code's effect in determining the trial evidence is a matter of influence rather than control. Trial judges exercise great discretion in determining what is and what is not relevant. This influence reveals a code that does not dictate decision rules but rather influences outcomes by shaping the evidence pool from which the jury derives its verdict. Further, this evidence-screening effect of criminal codes has diminished with the modern trend away from specific and restrictive relevancy rules.[128] As the relevancy rules have become broader and more permissive, the trial judge gains influence on the jury's verdict at the expense of the code. A judge's discretionary decision to admit a range of evidence relating to the defendant's mental illness, for example, might shape the facts leading to a final verdict as much or more than the particular insanity formulation that the legislature adopted.

127. *See, e.g.*, Fed. R. Evid. 402 ("Evidence that is not relevant is not admissible.").

128. *See, e.g., id.* ("All relevant evidence is admissible, except as otherwise provided . . . .").

The current more liberal and discretionary system of trial evidence would not so threaten code influence if juries really did understand and faithfully follow their legal instructions. It is this combination of marginally relevant evidence and poor understanding of the legal rules that renders jury decisions so unpredictable. No doubt drafters created the modern rules of evidence in ignorance of the limited effect of jury instructions that is now apparent. Should the limited effectiveness of instructions suggest a more restrictive relevancy standard?

In at least one respect, the independence of juries argues for more, not less evidence to be introduced at trial. When a jury decides that it does not like the result generated by the liability rules and chooses to ignore those rules to reach a verdict that it prefers, it no doubt assumes that the evidence presented at trial gives a complete picture of what really occurred. In reality, the screening of evidence at trial may give the jury an incomplete or distorted picture. And, the verdict that the law suggests might well be consistent with the jury's view if the jury had the full picture. One can imagine, for example, that a compassionate jury might well acquit a sympathetic defendant charged with a single count of check fraud, reasoning that to forgive this single transgression and avoid the burden of a criminal record is a better course than risking pushing the defendant toward a criminal life by branding the defendant a criminal for this minor offense. The prosecution of this single count may seem the result of excessive prosecutorial zeal, which ought to be curbed in the best tradition of the jury as a safeguard against prosecutorial abuse of discretion. The jury might be less inclined toward its nullification verdict, however, if it knew that the defendant had thirteen previous convictions for the same offense, a fact withheld from the jury because of its potential to "prejudice" the jury's verdict.[129]

Evidence screening at trial may well be the single most effective means by which the code's liability rules have influence. But, such screening also increases the likelihood that, with an incomplete or distorted picture of the case, a jury will see the verdict that the law's rules suggest as inconsistent with its views and a candidate for nullification. This calls for a reexamination of the screening rules to see whether the potential distortion that each rule creates is justified. It also raises the issue of whether a judge should tell a jury that the evidence at trial is not giving the jury a complete picture of the facts of the case and that

129. *See, e.g.*, FED. R. EVID. 403.

the judge is withholding some facts from the jury because of the potential prejudicial nature of those facts. At the very least, this would put the jury on notice that there is danger in straying too far from its legal instructions in the belief that its intuition of justice produces a better result.[130]

B. Code As Legitimizer

Another effect of a code and code reform, even more indirect than a trial evidence screen, is enhancing the legitimacy of the system. When a faculty, a PTA, or a housing coop meets, they may only occasionally follow Robert's Rules of Order, although those rules formally govern. Nonetheless, the existence of an authoritative set of rules gives stability and legitimacy to the process that it would not otherwise have; they can be resorted to if needed and in that way, influence the meeting even though not rigidly adhered to. Likewise, the existence of a detailed written description of the criminal law's prohibitions and adjudicatory rules gives the criminal justice system stability and legitimacy that it would not otherwise have. This is so even if the public never reads the description of prohibitions and even if judges and juries do not strictly follow the adjudicatory rules. The knowledge of the rules' existence, that they have been carefully crafted, and that they are authoritative, gives the public a sense of confidence and order, just as the existence of Robert's Rules gives the meeting participants a sense of confidence and order.

This public perception of authoritative rules promotes cooperation and acquiescence in criminal justice authority because it suggests that the police officer, prosecutor, judge, or other official probably has the authority to do what is being done. This is as true for acquiescence to a police officer on the street as to a judge at trial. People frequently question and object to official action but they defer to the

130. The code may also influence the liability decision by guiding the judge's power to dismiss a case. But it is typically so difficult to meet the standard for dismissal that, as a practical matter, cases where the court will seriously consider the matter will be rare. *See, e.g.*, Jackson v. Virginia, 443 U.S. 307 (1979) (constitutionally requiring reversal of conviction if on the evidence adduced at trial, taken in the light most favorable to the prosecution, no rational trier of fact could have found proof of guilt beyond a reasonable doubt). The code also has an influence on the police in making arrest decisions and on prosecutors in their charging decisions. However, just as trial results, not the formal criminal code rules, drive plea agreements, so too do predicted trial results drive charging decisions. Similarly, charging decisions or, frequently, police or community perceptions of illegality, drive arrest decisions. Thus, although the code has an influence, that influence is filtered through the distortions of misunderstood jury instructions and mass media representations of the liability rules.

vast majority of such actions. This deference comes from the system's reputation for fairness, which in large measure derives from the perception that it is "a system of laws, not of men." Consider what the credibility of the system would be if no criminal code existed or if everyone understood that its provisions were not authoritative.[131] The natural inclination would be to dispute every action unless the particular official had a reputation for fairness, an impossible working standard in a large society. Consider the anarchy that reins where the perception of arbitrariness or corruption robs the law and its officers of this credibility. If we are to maintain order in the absence of a credible system of law, it must be imposed by brutality and terror. Iraq and pre-UN Somalia may be recent examples of societies where force substitutes for credibility.[132]

As the previous sections detail, the code does not have the effect that drafters generally ascribe to it. The system may not deserve credibility as the "system of law, not of men" that it presently enjoys in the United States. However, the practical benefits of legitimacy follow as long as people *perceive* the system as one that follows carefully constructed liability rules.[133] We consciously advance this perception of legality with the ceremony of jury instructions at public trials. Jurors are sworn to do their duties of deciding the case under a neutral set of principles given to them by the court. The appellate review of every

131. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW chs. 3-4 (1990). Tyler cites a number of other studies that suggest similar conclusions. *Id.* at 30-39. Other research supports the conclusion that a tension or contradiction between legal code and community standard has some of the consequences suggested. Studies show that the degree to which people report that they have obeyed a law in the past and plan to obey it in the future correlates with the degree to which they judge that law to be morally valid. HERBERT JACOB, DEBTORS IN COURT: THE CONSUMPTION OF GOVERNMENT SERVICES (1969); CHARLES R. TITTLE, SANCTIONS AND SOCIAL DEVIANCE: THE QUESTION OF DETERRENCE (1980); Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325 (1980); Robert F. Meier & Weldon T. Johnson, *Deterrence as Social Control: The Legal and Extralegal Production of Conformity*, 42 AM. SOC. REV. 292 (1977); Matthew Silberman, *Toward a Theory of Criminal Deterrence*, 41 AM. SOC. REV. 442 (1976). Tyler's recent study, TYLER, *supra*, comes to similar conclusions. The degree to which his respondents saw the legal authorities as having legitimate power predicted their willingness to obey various laws promulgated by those authorities.

132. *See, e.g.*, AMNESTY INTERNATIONAL USA, AMNESTY INTERNATIONAL REPORT: 1990, at 1-8 (1990).

133. Sarat, *supra* note 21, at 20-21. Sarat's data indicate that support for the legal system declines as knowledge of the law increases. Sarat's results appear to validate the body of literature that indicates that a basic incompatibility between public knowledge of and support of legal institutions exists such that the stability of the legal system rests on public ignorance and apathy. *Id.*

detail of the instructions and reversal for errors only enhances the perception that juries have returned verdicts under strict rules of law.

In this respect, code reform efforts may be more important than the code reform itself. The extensive debate over criminal code formulations furthers the perception (and reflects the widespread belief of the participants) that the code provisions really matter. There are many pieces to this pageant of legitimacy. As long as everyone plays their part, we benefit from the order that follows.[134] (Perhaps writing this Article is traitorous in this respect, only defensible because it will only be read by those who cannot alter public perception?)

C. Code As Intellectual Battleground

The legitimizing power of codes and code drafting as a public demonstration of the society's commitment to the rule of law does not fully explain the persistent and impressive devotion to code reform. If the *perception* of legality were the primary benefit from code reform, it would be difficult to explain many of the extraordinary reform efforts recounted at the beginning of this Article. After decades of debating and redrafting a code proposal, only the consummation of code reform enhances the system's credibility. To devote such resources to reform is to admit publicly that reform is needed; to fail to bring it about is to leave a public perception that drafters have not undertaken needed reform. That cannot help the criminal law's credibility.

Further, anyone familiar with one of the code reform campaigns will be quick to tell of the genuineness of the feelings on each side of the debate. The participants certainly do not see themselves as acting out a pageant of legitimacy. They are sure in their conviction that what they fight for really does matter in a direct and important way. My experience with the federal criminal code reform battles gives rise to some personal data. The battles could not have been more ferocious. Extended controversy swirled around provisions such as the definition of conspiracy, the adoption of a mistake of law defense, and the formulation of the insanity defense. Those who followed the

134. I mean only to point out that such a deception is perpetuated, not that it ought to be. I am on record as being skeptical that such large-scale public deceptions can be maintained and as pointing out the serious costs when the deception is revealed. Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 5 J. Contemp. Legal Issues (forthcoming 1995) (criticizing the "acoustical separation" approvingly observed by Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625 (1984)); Robinson, *Rules of Conduct*, *supra* note 19, at 758 n.66.

debate will remember the virulent anticode campaign. "S. 1," as the Senate bill was numbered, became a dirty word. When the sponsors introduced a revised version in the following Congress, they felt compelled to delay introduction to get a different bill number. That bill, S. 1437, was eventually passed by the Senate despite harsh criticisms from its opponents who dubbed the bill "Son of S. 1" in an attempt to turn sentiments against its passage. Clearly, something more than a desire for the perception of legality motivated the participants on each side. They thought that they were indeed fighting about things that mattered. Why?

Perhaps the code's formulations are important not only for their present effect on the operation of criminal law practice but also for the direction they point for future criminal law development. That is, even if their current influence may be diluted by a system in which the written rule has only marginal effect, the rules set the system's "official ideal." Over time, the practice should move toward that ideal. There is much in the history of code reform that supports this view. It shows a remarkably consistent pattern of refinement that starts with the discretion of decisionmakers, follows with codification in the formal rules, and concludes with reflection in operational norms of the system.[135] From this perspective, criminal code formulations are important despite their limited immediate practical effect. Today's reform debates set the everyday reality of tomorrow.

V. SUMMARY AND CONCLUSION

The enormous efforts devoted to criminal code reform suggest, and the specific claims of drafters and scholars confirm, a common belief that the formulations of criminal codes perform the following standard functions: communicating the law's commands to the general public, determining the rules by which courts assess criminal liability, and setting the general range of punishment for a violation.

But available data suggest that criminal codes do not perform these functions, at least not to the extent or in the manner assumed. Public knowledge of criminal law is low. What people do learn they learn from sources other than the code and commonly is wrong. Juries do not understand much of their legal instructions on the minimum requirements of liability and offense grades. Even when juries

135. *See* Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815 (1980).

understand the legal rules, they may not adhere to them. Finally, the traditionally broad discretion of sentencing judges means that the grading differences expressed in the code and determined by juries have only a marginal effect in determining an offender's sentence. The trend toward sentencing guidelines reduces judicial discretion but substitutes sentencing guideline control rather than criminal code control over the punishment range.

As a whole, the data suggest that criminal codes have some attenuated influence on these functions but not the control drafters assume. And where influence exists, it commonly exists through a mechanism different than assumed. The code's greatest influence in assessing liability and grade may be indirect through its effect on a judge's screening of the evidence presented at trial.

A more accurate understanding of the limits of current codes suggests different approaches to code drafting. For example, there is little reason to codify detailed rules that do not correspond to shared community intuitions. Recall the rules limiting the use of defensive force against an unlawful arrest or a person taking property under a claim of right, rules designed to "reduce . . . clashes of force," to substitute "judicial resolution of the legality of the arrest, rather than self-help," and to force the possessor of property to "take his claim to the property to court."[136] But, because our current system fails to effectively communicate the code's rules to the average person, these defensive force rules cannot have their intended effect. Indeed, using them to assess liability only creates injustice: The defendant is held liable for violating a rule that we cannot reasonably expect the defendant to know.

Until we improve the code's communication function, there is danger of unfairness in rules that deviate too far from the intuitions of average people. Until we make jury instructions more comprehensible, there is little reason to argue about the precise wording of code formulations. Until we limit judicial sentencing discretion or incorporate sentencing factors into the criminal code, there is little reason for code drafters to labor over offense grading distinctions or for juries to debate the application of the code's distinctions.

While their influence in performing the public communication, liability assignment, and grading functions may be attenuated and

136. *See supra* notes 32-34 and accompanying text.

indirect, criminal codes appear to serve other, perhaps less conspicuous roles. The existence of the code and the seriousness with which members of the legal community undertake its reform serve to enhance the impression that impartial laws rather than the prejudicial whims of individuals govern our criminal justice system. The code also sets the official ideal for the criminal justice system. Its reform occasions the important debate over what this ideal should be and, in all likelihood, shapes the system's actual operation in the future.

There is much that can be done to enhance the effectiveness of today's criminal codes in their primary functions. By segregating the conduct rules from the principles of adjudication, the public can more realistically be expected to understand the former, at least with the help of a more serious program of dissemination and education than that which currently exists. Reformers can make jury instructions more comprehensible, if not dramatically so. To have a significant effect on jury decisionmaking, however, reformers must substantially alter the process of instruction and appellate review of instructions. Even then, jurors may fully understand the code's liability rules and conscientiously apply them only if the rules are fashioned to track jurors' intuitive notions of justice. Finally, if codes rather than judges or parole or sentencing commissioners are to set the general range of punishment for an offender, the criminal code (or a separate sentencing code) must embody the factors that are most relevant in determining the range of punishment.

Whether reformers ought to pursue these measures, whether we want more effective criminal codes, is in some respect dependent on our selection of the institutions or persons we wish to exercise criminal law's functions. The current system tends to have the mass media shape public perception of what the criminal law commands, individual juries decide *ad hoc* the rules for criminal liability, and individual judges decide the range of punishment. Present criminal codes claim, falsely it appears, that these functions are performed by the legislature, which is as one would want and expect in a well developed democracy.

Aside from the matter of legislative control, effective criminal codes are preferable to legislation by mass media or to discretionary *ad hoc* judgements by judges or juries for several reasons. First, only a criminal code can give adequate prior notice of the conduct rules. Compliance with the law's commands is unlikely if lawmakers inaccurately or ineffectively communicate those commands, or if, because of

ex post, ad hoc discretion, offenders cannot know the governing "law" at the time of the offense. Punishment for a violation of law is unfair under such inaccurate or ineffective communication. An effective criminal code can provide the prior notice of the law's commands that fairness and deterrence require.

An effective code also can avoid the problems associated with unguided discretion: first, the potential for abuse and the reliance upon personal prejudice, and second, the increased likelihood of unwarranted disparity as similar cases are treated differently simply because different juries or sentencing judges decide them. Unguided jury or judicial discretion leaves the adjudication process unpredictable, which contributes to a lack of prior notice, which again is unfair to the defendant and undercuts the effectiveness of the deterrent message for potential offenders.

Criminal codes are not now irrelevant, but neither do they have the influence that the virtues of legality demand or that code reform efforts presuppose. If we believe in the virtues of legality, then criminal codes ought to control the criminal justice process, in much the way that we have claimed and believed that they do.